



DEFENDING HEALTHCARE PROSECUTIONS

By:

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Main Statute – Healthcare Fraud Statute; Title 18; U.S.C. 1347

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice –

- To defraud any healthcare benefit program; or
- To obtain, by means of false or fraudulent pretences, representations, or promises, any of the money or property owned by, or under the custody or control of, any healthcare benefit program, in connection with the delivery of or payment for healthcare benefits, items, or services, shall be fined under this Title or imprisoned not more than 10 years or both.
- Violation results in serious bodily injury as defined in Section 1365, 20 years.
- Violation results in death, up to life.

Other theories of prosecution; wire fraud, mail fraud, false statement, conspiracy.

Activities that may be prosecuted:

- Up Coding
- Services not provided
- Phantom patients
- Unlicensed providers
- Kickbacks



Defensive Measures

Examine indictment

- Bill of Particulars. If indictment is too vague or indefinite to reasonably allow defendant to prepare defense. Use to flush out Government's case when dealing with general allegations.
- Example: false statements or misrepresentation to Medicare, ask they be stated with particularity.

Analyze the law and Government interpretation

- Educate Court in trial brief. Example, allegations of kickbacks. (Might fall under Safe Harbor provision.) Example:
 - Personal services and management contracts in place “remuneration” would not include payment made by a principal to an agent as compensation for the services of the agent as long as seven specified standards are met.
 - Employees are excluded from “remuneration”.

See, 42 C.F.R. Section 1001.952.

Beware of Texas Medicaid Fraud Control Unit (MFCU); Trojan Horse

- State Health & Human Services Commission/OIG (civil)
- Now OIG subpoena power to compel production of documents directly from Medicaid providers
- Documents available to MFCU criminal investigators in building criminal case

Determine if Improper Parallel Investigation

If too intertwined could violate 4, 5, 6 Amendments.

- Whether notice that evidence provided could be used in criminal case
- Whether civil investigation brought in bad faith
- Whether target was represented by counsel
- Whether target invoked 5th
- Whether target waived those rights

Discovery

- Obtain standard discovery quickly
- Oral/written statements
- Prior record
- Informants
- Documentation relevant to the defense including patient records/billing
- Reports and/or examinations by civil regulators use FOIA/Open Records Request
- Subpoena Government helpers (Tri-Centurion, TrailBlazer)
- Determine early if there will be expert testimony and get all documentation supporting opinion

Third party discovery via subpoena

- Federal Rule of Criminal Procedure 17(c) used to obtain documents from private insurance company, health providers, patient records, billers.

File *ex parte in camera* under seal to obtain need to show:

- Documents are relevant and of evidentiary value
- Not otherwise procurable
- Need for the proper preparation of defense and inspection in advance of trial
- The application must be made in good faith

Experts

Expert testimony governed by Federal Rule of Evidence 702.
Prepare *Daubert* challenge. Get Government to commit early by way of motions if they will be using expert.

- Send discovery request pursuant to Rule 16
- Do full background investigation of expert reading other transcripts and opinions
- Retain defense expert

- Benefits of a *Daubert* challenge give insight into Government's case and may expose weaknesses while locking in witness
- Under FRE 702 “expert” may not be qualified to express opinion about Medicare's regulations and how to apply

Flesh out uncharged conduct 404(b) challenge

- 404(b) material improper evidence of “other bad acts” show that it just proves acted in conformity. Attack under 403 and 404(a).
- Be careful of inclusion of other “intrinsic” evidence. Too much intrinsic evidence may cause a “variance”. Theory may be fatal variance from indictment.

Attacking Government's summary charts

Government will use summary charts for Medicare and Medicaid billing.

- Challenge under 1006 summaries that they might be inaccurate, incorrect and/or misleading
- Rule of Completeness 106 to get all documents.
- Move to preclude forcing Government to prove case through actual evidence instead of summary.

LOSS

Controls Sentence

- Individualized intent controls loss calculations
- Medicare fee schedule does not mandate intended loss under Guidelines be based on amounts allowed under schedules
- Show client did not intend loss to be amount claimed or submitted to Medicare
- Focus on client conduct and intent
- Stay away from expert opinions about Medicare billings generally